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No. 79-1763

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE CHLORINE INSTITUTE INC., ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 613 F.2d 120.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1980 (Pet. App. 33a-34a), and petitions for rehearing were denied on April 7, 1980 (Pet. App. 35a). The petition for a writ of certiorari was filed on May 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly determined that the Secretary of Labor's promulgation of an occupational health standard for chlorine contained an inadvertent error and accordingly permitted the Secretary to make the correction without compliance with the rulemaking procedures of 29 U.S.C. 655(b).

STATEMENT

1. Section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(a), granted temporary authority to the Secretary of Labor to promulgate, "as soon as practicable" and without advance notice or opportunity to comment, any standard previously established under a federal statute or any standard developed by a nationally recognized private standard-setting organization as a mandatory OSHA standard. See 29 U.S.C. 652(9) and (10). Among the established federal standards available to the Secretary for promulgation were hundreds of standards then in effect under the Walsh-Healey Act, 41 U.S.C. 35 *et seq.*, governing public contractors, and the Contract Work Hours and Safety Standards Act, 40 U.S.C. 333 (the "Construction Safety Act"), governing federally funded construction work.[1] Both stanudards regulated employee

[1] The Walsh-Healey standards were codified at 41 C.F.R. 50-204 and the Construction Safety Act standards were codified at 29 C.F.R. Part 1518. The latter standards were subsequently recodified at 29 C.F.R. Part 1926. 36 Fed. Reg. 25232 (1971).

exposure to chlorine but the quantitative exposure limit was different under each standard. Although both standards incorporated by reference the numerical limitations recommended by the American Conference of Governmental Industrial Hygienists ("ACGIH"), a private organization that annually publishes a table of Threshold Limit Values for hundreds of toxic substances, the Walsh-Healey standards promulgated in 1969 used the 1968 ACGIH list while the Construction Safety Act standards promulgated in 1971 used the 1970 ACGIH list. The 1968 and 1970 lists were substantially similar except for the values for approximately 40 substances, including chlorine. The 1968 list specified a ceiling concentration for chlorine, that is, exposure could not at any time exceed one part per million parts of air ("1 ppm"). This specification was made by inserting a "C" (for ceiling) before the word "chlorine" (R. 16, 18).[2] The 1970 ACGIH list specified only a time-weighted average (TWA) of 1 ppm, that is, exposure could exceed 1 ppm so long as there were compensating exposures under 1 ppm to achieve an average of 1 ppm over a normal work day. This specification was made by simply omitting the "C" before the word "chlorine" (R. 45, 47).

2. On May 29, 1971, the Secretary adopted numerous established federal standards and national consensus standards as mandatory OSHA standards

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[2] "R." refers to the certified portions of the record filed with the court of appeals. A copy of the record is currently lodged with the Clerk of this Court.

under 29 U.S.C. 655(a). 29 C.F.R. Part 1910 (36 Fed. Reg. 10466 (1971). 29 C.F.R. 1910.12 adopted the Construction Safety Act standards, including a TWA value for chlorine, but limited their application to construction work. 36 Fed. Reg. 10469 (1971). 29 C.F.R. 1910.21-1910.331 adopted the so-called "general industry" standards for application in all industries. 29 C.F.R. 1910.93 regulated exposure to numerous air contaminants. The regulations expressly stated (29 C.F.R. 1910.99; 36 Fed. Reg. 10523 (1971)) that the source for the group of standards including the chlorine standard was "41 C.F.R. 50-204.50," which incorporated the 1968 ACGIH list (specifying 1 ppm as a ceiling limit for chlorine). For the convenience of affected persons, the Secretary reprinted the list of contaminants and their respective limits in 29 C.F.R. 1910.93. By mistake, however, the 1970 list, not the 1968 list, was reprinted. This introduced a number of errors, one of which was that the entry for chlorine omitted the "C" code that indicated the permissive exposure limit was a "ceiling" rather than a TWA. See 36 Fed. Reg. 10504-10505 (1971).

The Secretary soon discovered that the wrong list had been reproduced and attempted to correct this mistake three months later by issuing a revised version of 29 C.F.R. 1910.93. 36 Fed. Reg. 15101-15102 (1971). This eliminated any reference to the ACGIH list and published a corrected table more closely corresponding to the 1968 ACGIH list.[3] By further

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[3] Originally, 29 C.F.R. 1910.93(a) specified that concentrations "above those specified in the 'Threshold Limit Values of

error, however, a few discrepancies, including the entry for chlorine, remained uncorrected. As a result, 29 C.F.R. 1910.93 still omitted the "C" code before the word "chlorine" and thus failed to state that the 1 ppm limit was a ceiling, not an average, limitation.

On December 8, 1978, the Secretary published further corrections, specifically stating that the original publication in 1971 had erroneously published the 1970 ACGIH list and that the August 1971 correction had not completely substituted the 1968 values. Among about 27 other changes, the Secretary corrected the entry for chlorine by inserting the "C" code to show, as 41 C.F.R. 50-204.50 had required, that the 1 ppm standard was a ceiling, not a TWA. 43 Fed. Reg. 57601 (1978) (Pet. App. 11a-19a).[4]

Although these corrections were made effective immediately, the Secretary suspended the chlorine correction on February 6, 1979, and invited comment thereon and on employee exposure to chlorine (44 Fed. Reg. 7141 (1979); Pet. App. 20a-22a). Petitioners and others responded by arguing that there had been no mistake in the original promulgation

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Airborne Contaminants for 1970' of the [ACGIH]" had to be avoided by feasible equipment and controls. The correction omitted any reference to the 1970 list. 36 Fed. Reg. 15101-15102 (1971).

[4] Originally, the list was reprinted as "Table G-1" in 29 C.F.R. 1910.93. 36 Fed. Reg. 10504 (1971). In 1975, it was redesignated as "Table Z-1" in 29 C.F.R. 1910.1000, the agency's recodification of 29 C.F.R. 1910.93. See 40 Fed. Reg. 23072, 23073 (1975).

and that a TWA was as protective as a ceiling (R. 129-140, 220-226). Several unions representing affected employees maintained that the ceiling value adopted under the Walsh-Healey standards was the only lawful value because the Act specifically required the Secretary "[i]n the event of conflict among [established federal standards], the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. 655(a). The unions contended that a ceiling value provided more protection because only that restriction could prevent the danger of short-term exposure to high concentrations of chlorine (R. 227-253). After evaluating these comments, the Secretary terminated the suspension and the 1 ppm ceiling limit became effective (Pet. App. 23a-26a).

3. Pursuant to 29 U.S.C. 655(f), petitioners then sought judicial review of the correction of the standard in the court of appeals.[5] The only issue presented

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[5] After the Secretary lifted the temporary suspension of the chlorine correction, petitioners applied to the agency for a stay pending judicial review. The Secretary denied a stay pending judicial review because a ceiling value would provide greater protection to employees and because the harm flowing from a stay of the correction would outweigh the burdens of compliance incurred by the employers (Pet. App. 27a-32a). Petitioners then sought and were granted a stay by the court of appeals pending review by that court.

After the court of appeals had upheld the Secretary's actions and removed its stay, petitioners sought a stay in this Court. The Secretary did not oppose a stay, pending the disposition of the certiorari petition, of the requirement for implementation of feasible engineering controls and work practices to achieve a ceiling exposure limit of 1 ppm. How-

by petitioners was whether the Secretary's original promulgation of the chlorine standard was in fact a mistake. Petitioners conceded (Br. 12) that if the standard had been published in error, the Secretary had inherent authority to make the correction without proceeding under 29 U.S.C. 655(b).[6] See *American Trucking Ass'n* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958). Petitioners contended, however, that the original standard had not been a mistake and therefore that the Secretary was required to follow the rulemaking procedures of 29 U.S.C. 655(b) in making any change.

The court of appeals concluded, based upon a number of factors, that there was substantial evidence to support the Secretary's determination that an inadvertent error had been made and that the 1978 amendment was merely a correction (Pet. App. 1a-10a). First, the court of appeals noted, the source-of-standards section of the general-industry regulations specifically listed the 1968 standard as the source for chlorine. Second, chlorine was not the only substance as to which the Secretary had erred; there

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ever, the Secretary opposed, and on May 19, 1980, this Court denied, a stay of employers' obligation to provide effective respirators to employees exposed to chlorine concentrations in excess of 1 ppm.

[6] See also Pet. App. 8a n.6. 29 U.S.C. 655(b) generally provides for notice and comment procedures, characteristic of informal rulemaking, as well as a hearing upon request, whenever the Secretary promulgates, modifies or revokes an occupational safety and health standard. *See Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 472 (D.C. Cir. 1974).

were between 30 and 40 errors in the original promulgation that the Secretary had sought to correct, and a number of these errors (*e.g.*, the omission of the "C" notation for two other substances, as well as the complete omission of any standard for one substance) had, like chlorine, taken seven and one-half years to correct. Third, because the 1968 standard was stricter, the error was not one that employers would have raised in enforcement proceedings. Fourth, the 1970 standard was adopted for the construction industry alone in a different section of the regulations, 29 C.F.R. 1910.12. Finally, the court noted that under Section 6(a) of the Act, 29 U.S.C. 655(a), the Secretary, in the event of conflict between preexisting standards, was required to adopt "the standard which assures the greatest protection of the safety and health of the affected employees." In the court's view, adoption of the 1968 standard was therefore the only action consistent with this statutory mandate (Pet. App. 9a-10a).

ARGUMENT

1. The decision of the court of appeals is correct. Petitioners conceded below (Br. 12) that, in circumstances such as those presented here, "administrative agencies may correct inadvertent ministerial errors." Petitioners contended only that the 1971 omission of the ceiling code had not been such a mistake but had been a deliberate policy choice that could be modified only through the rulemaking procedures of 29 U.S.C. 655(b). The court of ap-

peals reviewed the circumstances supporting the Secretary's claim of error and correctly sustained the claim. This is essentially a factual issue that does not warrant review by the Court.

Petitioners contend (Pet. 8-10), however, that in sustaining the Secretary's position that the 1971 omission had been inadvertent, the court of appeals improperly relied upon extra-record evidence showing that a ceiling is more protective than a TWA limitation. As mentioned above, one of several grounds offered for the court's conclusion that a mistake had occurred was that under 29 U.S.C. 655 (a) the Secretary was required to adopt the more stringent of conflicting standards and that the ceiling was more protective than the TWA limitation.

The conclusion that a ceiling limit is more protective than a TWA limit is simply a matter of unassailable good sense. A TWA limit cannot possibly provide greater protection than a ceiling limit because, while both permit identical excursions *below* the exposure limit, only the TWA allows excursions *above* the limit. In practice, therefore, ceiling limits are more protective by eliminating such excess exposures.[7] Petitioners also overlook the fact that this

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[7] Petitioners argue (Pet. 10 n.3) that it is possible that a ceiling is *less* protective than a TWA limitation because it would be possible under a 1 ppm ceiling limitation to have a continuous exposure of 1 ppm over a normal work day while a TWA standard of 1 ppm "may have a much lower average exposure for most of the period" in order to compensate for excursions above 1 ppm. However, under a ceiling limitation, the excursions above 1 ppm would be totally eliminated and

was only one of a number of bases for the court's decision (see pages 7-8, *supra*).

2. For the first time, petitioners challenge (Pet. 12-14) the Secretary's authority to correct the error in the chlorine standard without instituting full-scale rulemaking procedures under 29 U.S.C. 655(b). Contrary to their position in the court of appeals, petitioners now dispute the applicability of this Court's decision in *American Trucking Ass'n* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), to rulemaking.

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the excursions below 1 ppm would be unchanged—with the result that the average exposure would be less.

Comments submitted in response to the Secretary's invitation to comment on the suspension of the chlorine amendment further explain why a ceiling limitation is more protective than a TWA limitation. The United Paperworkers International Union remarked (R. 233):

> Many of the industrial situations linked in the literature to adverse health effects, could have occurred, and could occur today, without necessarily violating a time-weighted average concentration of 1-ppm. Two cases-in-point are those described in the studies by McCord and by Ferris and associates, both of which were apparently relied upon fairly heavily to document the ACGIH limits.
>
> The study of Rupp and Henschler, upon which ACGIH apparently also relied, describes adverse effects from exposures which could very easily occur without violating a 1-ppm TWA limit. In fact, it appears fairly certain that *none* of the test subjects who experienced adverse effects in the Rupp and Henschler study *were* exposed to an 8-hour time-weighted average of 1 ppm or more on the day they were experiencing those adverse effects.
>
> We have detailed the severe adverse effects on employees from exposure to chlorine in concentrations greater than 1 ppm in our memorandum in opposition to petitioner's application for a stay.

This contention is similar to one of the issues presented in *Department of Energy* v. *Mobil Oil Corp.*, cert. denied, No. 79-1365 (May 12, 1980), concerning the authority of DOE to issue a corrective amendment to certain rules without reinstituting rulemaking procedures. However, the Court declined to review the issue in *Mobil*, and there is no more reason to grant review here. Indeed, this issue was not even advanced by petitioners below (see Pet. App. 8a n.6). Inasmuch as there are no "exceptional circumstances" warranting a departure from the Court's normal practice, the issue may not now be considered by the Court.[8]

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[8] *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Petitioners did not raise the issue in their petition for rehearing in the court of appeals. A separate petition for rehearing filed by PPG Industries, Inc., argued that any amendment to the chlorine standard that substantially revised the substantive impact of the standard could only be issued pursuant to the rulemaking procedures of 29 U.S.C. 655(b). This argument had not been made previously by any party to the review proceeding. The court of appeals denied the petitions without comment (Pet. App. 35a). *See United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). Cf. *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935). (We have lodged both petitions for rehearing and the briefs below with the Clerk of this Court.)

In any event, since the amendment was a correction and not a "modification" within the meaning of 29 U.S.C. 655(b), it is clear that the Secretary complied with all procedural requirements in exercising his power to correct the standard. First, as we argued in *Mobil*, such a correction is merely a continuation of a valid rulemaking proceeding and may be accomplished without notice and comment under 5 U.S.C. 553. Second, even if 5 U.S.C. 553 is applicable to such corrections, notice and an opportunity to comment were given when the Secretary postponed the effectiveness of the correction pending comment (Pet. App. 20a-22a). Third, the correc-

Petitioners' assertion (Pet. 12) that they have relied on the omission of the ceiling code in the chlorine standard does not improve their argument. First, the source-of-standard section in the regulations put petitioners on notice from the outset that the limitation adopted in 1971 was the 1968 ceiling limitation. In light of the contradiction on the face of the regulation, there was no basis for any reasonable reliance on the omission of the "C" code before the word chlorine in the 1971 promulgation. Second, petitioners were not entitled to rely on a regulation or interpretation that is inconsistent with a statutory mandate. See *Dixon* v. *United States*, 381 U.S. 68, 74-76 (1965); *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936); *Enfield* v. *Kleppe*, 566 F.2d 1139, 1142-1143 (10th Cir. 1977). As the court of appeals concluded (Pet. App. 10a), the promulgation of a TWA limit for chlorine "would have been a transgression of the precise instructions given by Congress" because it is less protective than a ceiling limitation. Third, the licensee in *American Trucking Association* also might have claimed reliance on the uncorrected certificate, because it had operated unrestricted service for approximately two years before the ICC initiated proceedings to correct the error. This factor, however, did not alter this Court's judgment that the inadvertent error could be corrected without instituting new proceedings. Fourth, the

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tion itself was accompanied by a finding that "good cause" existed to publish the correction without prior notice and public comment thereon (Pet. App. 13a). See 5 U.S.C. 553(b)(3)(B) and (d)(3).

Secretary has made the correction at issue in this case prospective only and permitted a 90-day delay in its effectiveness to permit employers to come into compliance with the ceiling limit.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Any employer who cannot meet the ceiling by the new effective date may apply for a temporary variance under Section 6(b)(6)(A) of the Act, 29 U.S.C. 655(b)(6)(A).

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